Michael K. Jeanes, Clerk of Court
*** Filed ***
08/19/2011 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000164-001 DT 08/17/2011

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
H. Beal
Deputy

STATE OF ARIZONA F TYLER RICH

v.

THOMAS H LEAVELL (001) SIMONE ANNE ATKINSON

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 13798966–01–05.

Defendant-Appellant Thomas Leavell (Defendant) was convicted in Phoenix Municipal Court of driving under the influence. Defendant contends the trial court erred in denying his Motion To Dismiss, which alleged the conduct of the officers violated his right to counsel. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On December 13, 2009, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2), driving under the extreme influence, A.R.S. § 28–1382(A)(1) & (A)(2), and failure to drive in one lane, A.R.S. § 28–729(1). Prior to trial, Defendant filed a Motion To Dismiss that alleged the conduct of the officers violated his right to counsel.

At the hearing on Defendant's motion to dismiss, Officer Eric Thornhill testified he had been a police officer for 20 years, had personally arrested approximately 2,500 persons for DUI, and had been the secondary officer on several thousand more DUI arrests. (R.T. of Nov. 15, 2010, at 43.) He graduated from Law School in 2004 and was admitted to the Bar in 2005, and had been the legal advisor to the Phoenix Police Department for the last 3 months. (*Id*. at 44.) On December 13, 2009, at about 12:11 a.m., he stopped an individual he identified as Defendant at 15,800 South 48th Street. (*Id*. at 38–39, 44–45.) He saw Defendant exhibit signs of intoxication, so he had him perform the HGN test, and on the basis of the available information, placed him under arrest at 12:17 a.m. (*Id*. at 46–47.) Londa Rivera was a passenger in Defendant's vehicle, and at one point Defendant told Officer Thornhill Ms. Rivera was his attorney. (*Id*. at 47.) Ms. Rivera testified she had been a sworn police officer in Tucson for 3 years and in Phoenix for 2½ years; had been a prosecutor with the Maricopa County Attorney's Office, where she had prose-

cuted misdemeanor DUIs and felony DUIs, and had written a handbook for drug recognition. (*Id*. at 7–9.) After the County Attorney's Office, she worked in David Cantor's office doing family law, then worked in Craig Penrod's office defending DUIs, then worked in Mark Weingart's office, and now was in a partnership with Defendant. (*Id*. at 6–8.) After Officer Thornhill arrested Defendant, he allowed Defendant and Ms. Rivera to talk in private. (*Id*. at 39, 48.)

Officer Thornhill then had Defendant transported to the DUI van, which was located at 4725 East Baseline. (R.T. of Nov. 15, 2010, at 48.) Once they got inside the DUI van, Officer Stevens assumed the investigation. (*Id*. at 49.) Defendant said he wanted to talk to an attorney, so Officer Thornhill gave him a telephone book and unlimited access to the cell phone in the van, but Defendant had a cell phone he appeared to use. (*Id*. at 49, 59–60.) Defendant gave the number 602–258–1850 to Officer Thornhill, but he only reached an answering machine. (*Id*. at 49–50.) Defendant asked Officer Thornhill to call another number, which he did, but again received no answer from a person. (*Id*. at 50.) At that point, Officer Thornhill suggested that Defendant could call David Cantor's office because someone from that office would return a call. (*Id*.) Officer Thornhill said he would never force a person to call any particular number, and would only have called Cantor's office if Defendant had agreed. (*Id*. at 51, 56, 60–61.) Officer Thornhill called Cantor's office and left a message with the answering service, and then an attorney named Coby Page called back. (*Id*. at 51–52.) Officer Thornhill and Defendant went outside the DUI van, and while Officer Thornhill stood 30 feet away, Defendant spoke on the phone for about 10 minutes. (*Id*. at 52–53, 62.) After that 10 minutes, Defendant said he would take the blood test. (*Id*. at 53.) Officer Thornhill spoke to Mr. Page, and Mr. Page said Defendant was not going to answer any questions and requested that Defendant be released so he could get an independent chemical blood test. (*Id*. at 53–54.) Once Defendant took the blood test, the officers released him, and he left in a taxi. (*Id*. at 54.)

Officer Brandon Stevens testified he had been a police officer for 13 years. (R.T. of Nov. 15, 2010, at 63.) On December 13, 2009, Officer Thornhill brought Defendant to the DUI van at 12:42 a.m. (*Id*. at 64, 68.) At 12:50 a.m., Officer Stevens gave Defendant the *Miranda* warnings and read him the admin per se admonition. (*Id*. at 65, 68.) Defendant said he wanted to speak to an attorney, so Officer Stevens gave Defendant the yellow pages and a cell phone. (*Id*. at 65.) At about 1:00 a.m., Defendant and Officer Thornhill left the DUI van and returned at 1:30 a.m. (*Id*.) Defendant then said he would take the blood test, which was done at 1:35 a.m.. (*Id*. at 65, 71.) Officer Stevens said he advised Defendant he would be taking two vials of blood and that one vial would be available for Defendant or his attorney to have tested, and advised Defendant he had the right to arrange for and pay for an independent chemical blood test at a hospital medical facility. (*Id*. at 65–66.)

Londa Rivera testified she was a passenger in Defendant's vehicle. (R.T. of Nov. 15, 2010, at 12.) Once Officer Thornhill stopped them and she was able to speak to Officer Thornhill, she told him she was an attorney. (*Id*. at 12, 17.) She also asked Officer Thornhill to call Officer Toby Ehrler, who did come to that location and was able to speak with Ms. Rivera. (*Id*. at 17, 19–

20, 47–48, 57.) Officer Thornhill gave Defendant and Ms. Rivera the opportunity to talk in private. (*Id*. at 12–13.) During that time, Defendant gave several items to Ms. Rivera, including a bottle of Jack Daniels that was in his suit pocket. (*Id*. at 13, 22–23.) Defendant gave Ms. Rivera a list of attorneys to call, and she placed numerous calls for him. (*Id*. at 14, 73–74.)

Defendant testified he was an attorney who did estate planning and civil litigation. (R.T. of Nov. 15, 2010, at 20–21.) He acknowledged Officer Thornhill allowed him to talk in private with Ms. Rivera. (*Id*. at 22, 35.) He said that, once they got to the DUI van, he asked Officer Thornhill to call an attorney named Borrelli, but Officer Thornhill never did. (*Id*. at 25–27.) He said he asked Officer Thornhill to call an attorney named Palmisano, but Officer Thornhill reached an answering machine, so he hung up. (*Id*. at 27.) He then said Officer Thornhill told him he would call David Cantor's officer, but he never agreed to have Officer Thornhill call Mr. Cantor. (*Id*. at 28.) He acknowledged an attorney returned the call, and that he spoke to that attorney for "a few minutes." (*Id*. at 28, 33, 36.) He claimed the officer was "about eight" feet away during that telephone conversation, but acknowledged he never asked the officer for "additional privacy or more distance." (*Id*. at 37.) He further acknowledged that, once the officers took his blood, they released him and he left in a taxi. (*Id*. at 31.) Defendant contended none of the officers advised him of the right to arrange for and pay for an independent chemical blood test. (*Id*. at 40–41.)

At the conclusion of the testimony, the trial court found Defendant had unlimited access to a telephone book and a cell phone in the DUI van. (R.T. of Nov. 15, 2010, at 83, 86.) It found Defendant spoke in private to a licensed attorney for 10 minutes. (*Id*. at 83–86.) It therefore denied Defendant's motion to dismiss. (*Id*. at 84.)

The matter then proceeded to a jury trial, which included evidence Defendant had a BAC of 0.215. (R.T. of Nov. 15, 2010, at 18, 37.) The jurors found Defendant guilty of the four DUI offenses; the trial court later dismissed the § 28–1381(A)(2) and § 28–1382(A)(1) charges as lesser-included offenses, and found Defendant responsible for the § 28–729(1) charge. On December 14, 2010, the trial court imposed sentence and on that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ABOUE ITS DISCRETION IN FINDING THE OFFICERS DID NOT VIOLATE DEFENDANT'S RIGHT TO COUNSEL.

Defendant contends the trial court erred in finding the officers did not violate his right to counsel. In reviewing a trial court's ruling on a motion to dismiss, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez,* 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm,* 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010). Based on this Court's review of the record, this Court concludes the trial court properly denied Defendant's Motion To Dismiss.

In the present case, the officers' testimony was contradictory to Defendant's testimony. Thus, the situation here was much like that in the following case:

> Defendant initially argues that the trial court should have dismissed the charge against him because his right to counsel was violated. At the hearing on the motion to dismiss, defendant testified that he asked to speak with his attorney prior to taking the breath test. He maintained that the police told him just to take the test. Two police officers testified that defendant did not ask to call an attorney.
>
> If defendant asked to speak with an attorney, he had a right to do so before taking the test. Ariz. R. Crim. P. 6.1(a); *State v. Juarez.* The conflicting testimony, however, created an issue of fact whether defendant actually made such a request. The responsibility of resolving factual disputes rests with the trial court. *State v. Tapia.* The trial court implicitly resolved the factual dispute in question against defendant in ruling that defendant had not been deprived of his right to counsel. Defendant does not claim that there is insufficient evidence to support such a finding. Under these circumstances, there is no basis for reversing the trial court's ruling.

State v. Vannoy, 177 Ariz. 206, 209, 866 P.2d 874, 877 (Ct. App. 1993) (citations omitted). In the present case, the trial court resolved the factual dispute in question against Defendant in ruling that Defendant had not been deprived of his right to counsel. The question then is whether there was sufficient evidence to support such a finding.

In order to determine whether there was sufficient evidence to support such the trial court's finding that the officers' conduct did not violate Defendant's right to an attorney, it is necessary to determine which right to an attorney was involved here. There are several sources that grant to a defendant the right to an attorney. The Sixth Amendment to the United States Constitution grants to a defendant the right to counsel as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend 6. The Sixth Amendment right to counsel does not attach, however, until after the initiation of formal charges. *Moran v. Burbine,* 475 U.S. 412, 431 (1986); *State v. Martinez,* 221 Ariz. 383, 212 P.3d 75, ¶ 11 (Ct. App. 2009), *quoting Fellers v. United States,* 540 U.S. 519, 523 (2004). In the present matter, the State did not file any charges against Defendant until after Defendant had been released from custody. Thus, during the period from when Defendant was arrested, through the taking of his blood, and after he was released from custody, Defendant's right to an attorney under the Sixth Amendment had not yet attached, so there could be no violation of a Sixth Amendment right to counsel.

The Arizona Constitution also grants to a defendant the right to counsel:

> In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

ARIZ. CONST. art. 2, § 24. Although this Court is not aware of any case that holds this right to counsel under the Arizona Constitution does not attach until after the initiation of formal charges, in *State v. Transon*, 186 Ariz. 482, 924 P.2d 486 (Ct. App. 1996), the court stated as follows:

> We have been unable to locate any authority for appellee's assertion that Arizona's right to counsel is broader than the federal right. Where, as here, the language of the federal and state constitutional provisions are substantially similar, we will use the same standard to analyze both provisions.[2]
>
> [2] *Compare* U.S. Const. amend. VI ("the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.") *with* Ariz. Const. art. 2, § 24 ("the accused shall have the right to appear and defend in person, and by counsel . . .").

186 Ariz. at 485 & n.2, 924 P.2d at 489 & n.2. Because both the Sixth Amendment and Article 2, Section 24 use the term "the accused," and because both provisions contain essentially the same rights, this Court concludes a defendant's right to counsel under the Arizona Constitution does not attach until after the initiation of formal charges. Thus, on December 13, 2009, when the events of this case transpired, Defendant's right to an attorney under Article 2, Section 24 had not yet attached, so there could be no violation of the right to counsel under the Arizona Constitution.

The Fifth Amendment to United States Constitution does not grant to a defendant the right to counsel, but instead provides in part as follows:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

U.S. CONST. amend 5. In *Miranda v. Arizona*, the Court held "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today." 384 U.S. 436, 469 (1966). The Court thus held that, in order to effectuate a suspect's constitutional right to remain silent, the suspect needs the assistance of an attorney. The Court further discussed that concept in *Edwards v. Arizona*, 451 U.S. 477 (1981):

> [W]e now hold that when an accused has invoked his right to have counsel present during *custodial interrogation*, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.

451 U.S. at 484 (emphasis added). The Court thus made it clear that the right to an attorney it was describing in *Miranda* was only the right to have an attorney present during custodial interrogation. In the present case, the officers never subjected Defendant to custodial interrogation, thus Defendant's right to an attorney under *Miranda* never attached.

Finally, the Arizona Rules of Criminal Procedure provide as follows:

> A defendant shall be entitled to be represented by counsel in any criminal proceeding . . . . The right to be represented shall include the right to consult in private with an attorney, or the attorney's agent, as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor.

Rule 6.1(a), ARIZ. R. CRIM. P. Because the right to an attorney is a substantive right, the Arizona Supreme Court could not, by enacting Rule 6.1(a), grant to a defendant the substantive right to an attorney. To the extent this rule is a restatement of the rights to counsel granted by the Sixth Amendment and Article 2, Section 24, those rights do not come into effect until the State has brought formal charges against a defendant, as discussed above. But Rule 6.1(a) also provides that a defendant may "consult in private with an attorney . . . as soon as feasible after a defendant is taken into custody." If a defendant is taken into custody before the State has brought formal charges against the defendant, that right to an attorney is not derived from either the Sixth Amendment or Article 2, Section 24, but is instead a procedural component of a defendant's due process right to obtain evidence:

> Appellee also correctly asserts that a right to counsel component is contained within Arizona's constitutional Due Process Clause. The right to counsel is an extension of the doctrine that defendants have the right to gather independent exculpatory evidence. Arizona's Due Process Clause guarantees DUI suspects "a fair chance to obtain independent evidence of sobriety essential to his defense at the only time it [is] available." Numerous Arizona cases have found due process violations where police conduct interfered with a defendant's right to gather evidence of sobriety before the evidence naturally dissipates. The right to a fair chance to gather exculpatory evidence includes reasonable access to counsel.

Transon, 186 Ariz. at 485, 924 P.2d at 489 (citations omitted). The question then is whether the record supports the trial court's ruling that Defendant's rights under Rule 6.1(a) were not violated.

As noted above, Rule 6.1(a) provides that a defendant may "consult in private with an attorney . . . as soon as feasible after a defendant is taken into custody." In the present case, Defendant told Officer Thornhill Ms. Rivera was his attorney. (R.T. of Nov. 15, 2010, at 47.) After Officer Thornhill arrested Defendant, he allowed Defendant and Ms. Rivera to talk in private. (*Id*. at 39, 48.) Officer Thornhill therefore allowed Defendant to consult in private with an attorney as soon as feasible after Defendant was taken into custody.

Further, once Defendant was at the DUI van, he asked to speak to an attorney. (R.T. of Nov. 15, 2010, at 49, 65.) The officers gave Defendant a telephone book and unlimited access to the cell phone in the van, and Defendant had a cell phone he appeared to use. (*Id*. at 34, 49, 59–60, 65.) Ultimately Defendant spoke to Coby Page for about 10 minutes. (*Id*. at 52–53, 62.) After that conversation with Mr. Page, Defendant agree to take the blood test. (*Id*. at 53.) The officers therefore did not interfere with Defendant's right to "consult in private with an attorney . . . as soon as feasible after [Defendant was] taken into custody."

Defendant contends, however, he did not want to deal with David Cantor's office and Coby Page was from David Cantor's office, and that Officer Thornhill forced Coby Page onto him over his objections. Officer Thornhill testified, however, he only suggested Defendant call David Cantor's office, and that he never forced Defendant to talk to Coby Page. The trial court apparently resolved this conflict in the testimony in favor of Officer Thornhill and against Defendant. Moreover, Defendant never made any claim he told Officer Thornhill he would not talk to Coby Page or anyone else from David Cantor's office. (R.T. of Nov. 15, 2010, at 28.)

Further, a review of the record shows the officers did not interfere with Defendant's ability to obtain exculpatory evidence. The usual exculpatory evidence that is identified is (1) witness observations and descriptions of the defendant's behavior, (2) videotapes of the defendant's actions, and (3) an independent chemical blood test. In the present case, Ms. Rivera had been with Defendant all evening, was with him when he was driving, and was with him when he was arrested. (R.T. of Nov. 15, 2010, at 12.) She thus could have testified about Defendant's behavior. Further, she had with her a cell phone. (*Id*. at 13.) In this day and age, it seems every cell phone, I-phone, and smart phone has in it a video camera, thus Ms. Rivera could have recorded Defendant's actions if she chose to do so. Finally, Coby Page asked Officer Thornhill to release Defendant right after the blood test so Defendant could get his own independent chemical blood test. (*Id*. at 53–54.) The officers then released Defendant right after the blood test, and Defendant left in a taxi. (*Id*. at 54.) The officers thus did not interfere with Defendant's ability to obtain exculpatory evidence.

When asked what he would have done differently if he had spoken to a different attorney, Defendant said, "I would have gone and gotten an independent blood test." (R.T. of Nov. 15, 2010, at 39.) Defendant does not explain, however, how his talking to Coby Page somehow prevented him from getting an independent test and how talking to a different attorney would have caused him to get an independent test. Defendant further said he "would have possibly, depend-

ing on what an attorney said, may have held out for them to have to get a warrant, may have done—I couldn't tell you." (*Id*. at 39–40.) Defendant was apparently saying he might not have agreed to take the blood test and instead forced the officers to get a search warrant. The due process right involved here is a defendant's right to obtain exculpatory evidence, which has been described as the right to consult with an attorney as long as it does not interfere with the State's investigation. This Court has found no case holding that a defendant's due process rights include the right to frustrate or prevent the state from obtaining its evidence.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court properly found the officers did not interfere with Defendant's right to consult with an attorney, and therefore properly denied Defendant's Motion To Dismiss.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Phoenix Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

_____

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT 081820111010